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# IMPACT WITHIN THE HUMAN RIGHTS FRAMEWORK



# 9. Urgent measures and Indigenous peoples' territorial rights in the Inter-American system

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## 1 INTRODUCTION

The Inter-American Court of Human Rights (IACtHR) may issue provisional measures, and the Inter-American Commission on Human Rights (IACHR, or the Commission) may issue precautionary measures, when an individual or collective group is in imminent danger of irreparable harm. These urgent measures<sup>1</sup> have saved the lives, the physical integrity, and other fundamental rights of thousands of human rights defenders, prisoners, persons with serious illnesses who lack adequate treatment, journalists, witnesses in criminal proceedings, prosecutors and judges facing threats, and members of Indigenous and tribal peoples, among others.

Until 2011, the IACHR had a well-established practice of granting precautionary measures to suspend administrative or judicial decisions that could cause irreparable harm to Indigenous territories. Typically, they asked states to refrain from certain actions until the IACHR could issue a final decision on the merits of a related case in dispute. The adoption of a new institutional practice in 2011 led the IACHR to limit the scope of the precautionary measures

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<sup>1</sup> The expression 'urgent measures' is used in this chapter to qualify the precautionary, provisional, or interim measures indicated by an international organ. This expression should not be confused with the 'urgent measures' that may be taken by the Presidency of the IACtHR prior to the decision on a request for provisional measures by its plenary, in accordance with Article 27(6) of the Court's Rules of Procedure. This provision states that: 'If the Court is not sitting, the Presidency, in consultation with the Permanent Commission and, if possible, with the other Judges, shall call upon the State concerned to adopt such urgent measures as may be necessary to ensure the effectiveness of any provisional measures that may be ordered by the Court during its next period of sessions'.

in favour of Indigenous and tribal peoples to the protection of their lives and physical integrity, with very few exceptions.

Since provisional measures are usually requested by the IACHR when a state fails to comply with its precautionary measures, the Commission's new approach has prevented the IACtHR from assessing the adequacy of provisional measures to protect Indigenous and tribal territories. This chapter examines the criteria of both organs of the Inter-American system when deciding on urgent measures in favour of Indigenous peoples, with a special focus on their territorial rights. The term 'Indigenous territorial rights' refers to the free use of their ancestral lands and natural resources, in accordance with their own traditions.

Following this introduction, the second section explains basic concepts with regard to provisional and interim measures under international human rights law, and how they are regulated in the United Nations and regional systems. The third section summarizes the Inter-American standards and special safeguards to Indigenous and tribal territories. Section 4 describes the circumstances in which the Inter-American Commission and Court have granted urgent measures to protect the rights of Indigenous and tribal communities. This section highlights the negative impacts of the IACHR abandonment of a well-established practice of requesting states to suspend decisions that could cause irreparable harm to Indigenous territorial rights.

The final section discusses possible ways to improve the protection of Indigenous territorial rights in the Inter-American system, consisting of (1) reinstating the urgent measures mechanism in exceptional circumstances, and (2) prioritizing the processing of contentious cases based on allegations of significant and irreparable harm to Indigenous and tribal lands.

## 2 URGENT MEASURES UNDER INTERNATIONAL HUMAN RIGHTS LAW

### 2.1 United Nations and Regional Human Rights Systems

Provisional and interim measures have been defined as orders that preserve certain rights under dispute and that safeguard the jurisdiction of an international tribunal. Article 41(1) of the Statute of the International Court of Justice (ICJ) establishes its faculty to 'indicate ... any provisional measures which ought to be taken to preserve the respective rights of either party'.<sup>2</sup>

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<sup>2</sup> Similarly, Article 41 of the Statute of the Permanent Court of International Justice establishes that: '[t]he Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to reserve the respective rights of either party'. Article 25 of the Statute of

Most of the United Nations (UN) treaty bodies,<sup>3</sup> the European Court of Human Rights (ECtHR) and the organs of the African Human Rights System have included in their rules of procedure the power to grant provisional or interim measures, using language similar to Article 41(1) of the ICJ Statute.

The European Convention on Human Rights and its Protocols lack a specific provision authorizing the ECtHR (and the former European Commission of Human Rights) to grant interim measures. Rule 39(1) of the Rules of Procedure of the ECtHR is the only normative source of this faculty in the European System.<sup>4</sup>

Rule 100 of the Rules of Procedure of the African Commission on Human and Peoples' Rights (ACHPR) establishes the faculty to indicate provisional measures.<sup>5</sup> Similarly, Rule 59 of the Rules of Procedure of the ACHPR acknowledges its authority to adopt provisional measures 'in case of extreme

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the International Tribunal for the Law of the Sea states that: 'the Tribunal and its Seabed Disputes Chamber shall have the power to prescribe provisional measures'.

<sup>3</sup> The treaty bodies are the committees of independent experts in charge of monitoring the implementation of the human rights treaties adopted by the UN General Assembly. See: OHCHR, 'Treaty Bodies' (OHCHR, 2024) <https://www.ohchr.org/en/treaty-bodies>.

<sup>4</sup> Rule 39(1) of the ECtHR Rules of Court reads as follows: 'The Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it'. See: ECtHR Rules of Court (2023), Rule 39(1) [https://www.echr.coe.int/documents/d/echr/rules\\_court\\_eng](https://www.echr.coe.int/documents/d/echr/rules_court_eng). Burbano Herrera and Hayek explain that the ECtHR has resorted to interim measures mostly in three situations: (1) imminent expulsion or extradition, (2) imminent enforcement of the death penalty, and (3) protection of the health of detainees. Interim measures have also been indicated in the context of contentious cases alleging arbitrary or illegal eviction of vulnerable individuals, the right to housing, the right to a fair trial in criminal proceedings, etc. See: Clara Burbano Herrera and Yves Haeck, 'Interim Measures in the Case Law of the European Court of Human Rights' (2003) 21 NQHR 631. See also: Clara Burbano Herrera and Yves Haeck, 'Staying the Return of Aliens from Europe through Interim Measures: The Case-law of the European Commission and the European Court of Human Rights' (2011) 13 *European Journal of Migration and Law* 31, 32–33.

<sup>5</sup> The ACHPR has granted provisional measures to protect the right to life and personal integrity and, to a lesser extent, other rights such as freedom of expression, the right to family, and the territorial rights of Indigenous peoples. See: *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe* App No. 284/03 (ACHPR, 3 April 2009) paras 11–12 and 28; *Amnesty International v Zambia* App No. 212/98 (ACHPR, 5 May 1999); *Centre for Minority Rights Development (Kenya) and Minority Rights Group International*

gravity and urgency and where necessary to avoid irreparable harm to persons' and 'pending determination of the main application'.<sup>6</sup>

Unlike the Inter-American system – where most of the urgent measures are indicated without a contentious case, the UN, European, and African human rights systems have no stand-alone interim or provisional measures; i.e., these measures must be requested in the context of a pending case.

## 2.2 Inter-American Human Rights System

The Inter-American human rights system (IAHRS) was established as a by-product of the Organization of American States (OAS), with the adoption of the American Declaration of the Rights and Duties of Man in April 1948.<sup>7</sup> It is composed of two organs, the IACHR and the IACtHR. Created in 1959, the IACHR<sup>8</sup> is composed of seven members elected by the OAS General Assembly, who perform their duties independently of any government. Its mandate is to promote respect for human rights in the Americas through the examination of individual complaints,<sup>9</sup> on-site visits, and thematic and country reports. It is also entitled to grant precautionary measures and request provisional measures

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*on behalf of the Endorois Welfare Council v The Republic of Kenya* App No. 276/2003 (ACHPR, 4 February 2010).

<sup>6</sup> For a detailed analysis of this issue, see: Gino J. Naldi, 'Interim Measures of Protection in the African System for the Protection of Human and Peoples' Rights' (2002) 2 *African Human Rights Law Journal* 1.

<sup>7</sup> American Declaration of the Rights and Duties of Man, OAS Res XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser L V/II.82 Doc 6 Rev 1 at 17 (1992).

<sup>8</sup> For an overview of the role of the IACHR since its creation in 1959, see: Robert K. Goldman, 'History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights' (2009) 31 *Human Rights Quarterly* 856, 857–8. For a more detailed account of the historical background of the IAHRS, see: Francisco-José Quintana, 'The (Latin) American Dream? Human Rights and the Construction of Inter-American Regional Organisation (1945–1948)' (2023) 25 *JHIL* 560–591.

<sup>9</sup> With the adoption of the first Statute of the IACHR in 1959, the member states of the OAS entrusted the IACHR with the mission of promoting awareness of human rights, making recommendations to governments for the adoption of progressive measures in favour of human rights, preparing studies, and serving as an advisory body to the OAS in this field.

from the IACtHR, to submit cases to this tribunal, and to serve the OAS as an advisory body.<sup>10</sup>

Adopted in 1969, the American Convention on Human Rights (ACHR) established the IACtHR, an autonomous judicial body whose purpose is to apply and interpret the ACHR. It is composed of seven judges elected by the state parties to the American Convention. It can issue advisory opinions regarding the interpretation of the Convention and any other human rights instrument. At the request of the IACHR or on its own initiative, the Court may issue provisional measures to prevent irreparable harm to the rights of persons in serious and extremely urgent situations.<sup>11</sup>

### 2.2.1 Provisional measures of the Inter-American Court of Human Rights

Article 63(2) of the American Convention establishes that:

In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.

These measures serve both a precautionary function, in the sense of preserving the *status quo* of a claim pending adjudication, and a protective function, as they seek to avoid irreparable harm to persons.<sup>12</sup>

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<sup>10</sup> See: American Convention on Human Rights (adopted 22 November, entered into force 18 July 1978) OAS Treaty Series No. 36, 1144 UNTS 123, Chapter VII. For an overview of the IACHR's main functions from its creation until 2014, see: Daniel Cerqueira and Katya Salazar, 'The Functions of the Inter-American Commission on Human Rights Before, During, and After the Strengthening Process: Striking a Balance between the Desirable and the Possible' in Due Process of Law Foundation and others (eds), *The Inter-American Human Rights System – Changing Times, Ongoing Challenges* (DPLF 2015).

<sup>11</sup> ACHR, Chapter VIII. As of September 2024, 23 out of 35 the OAS member states have ratified the ACHR, of which 20 accept the IACtHR's jurisdiction.

<sup>12</sup> This dual function has been explained by the IACtHR as follows:

The precautionary character is related to the framework of international contentious cases, as provisional measures intend to preserve the rights potentially at risk until the controversy is resolved. Their goal is to ensure the integrity and effectiveness of the decision on merits, and to avoid infringement of the rights under consideration, which could render innocuous or have an effect on the *effet utile* of the final decision. Provisional measures therefore allow the State in question to comply with the final decision, and, if applicable, to implement the reparations ordered. With

The IACtHR has stressed the following difference between the provisional measures under domestic procedural law and international human rights law:

The purpose of provisional measures in domestic legal systems (domestic procedural law) in general, is to preserve the rights of the parties to a dispute, thereby ensuring that execution of the judgment on the merits is not obstructed or otherwise prejudiced by their actions *pendente lite*. Under the International Law of Human Rights, urgent and provisional measures serve a further purpose, which is to protect fundamental human rights, thereby avoiding irreparable harm to persons.<sup>13</sup>

For several decades, the Inter-American Commission had exclusive *locus standi* to request provisional measures from the IACtHR. In 2003, the Court amended its Rules of Procedure to allow alleged victims and their representatives to submit this type of request in the context of contentious cases already under its jurisdiction.<sup>14</sup>

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regards to the protective character, the Court has indicated that provisional measures become a true jurisdictional guarantee of a preventive nature as they protect human rights, to the extent that they seek to avoid irreparable damages to persons.

See *Four Ngöbe Indigenous Communities and their Members v Panama*, Provisional Measures (28 May 2010) para 3. Internal quotation marks have been removed from the original text.

<sup>13</sup> *Case of Lysias Fleury*, Provisional Measures (7 June 2003) para 7. The paragraphs cited in the text are repeated in several other decisions on provisional measures indicated by the IACtHR. See: e.g., *Indigenous People of Sarayaku v Ecuador*, Provisional Measures (6 July 2004) paras 5–6; *Persons Imprisoned in the Dr Sebastião Martins Silveira Penitentiary in Araraquara, São Paulo*, Provisional Measures (30 September 2006) para 4.

<sup>14</sup> Following this amendment, Article 27 of the IACtHR Rules of Procedure now reads as follows:

#### Article 27. Provisional Measures

1. At any stage of proceedings involving cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court may, on its own motion, order such provisional measures as it deems appropriate, pursuant to Article 63(2) of the Convention.
2. With respect to matters not yet submitted to it, the Court may act at the request of the Commission.
3. In contentious cases before the Court, victims or alleged victims, or their representatives, may submit to it a request for provisional measures, which must be related to the subject matter of the case.
4. The request may be submitted to the Presidency, to any Judge of the Court, or to the Secretariat, by any means of communication. In every case, the recipient of the request shall immediately bring it to the attention of the Presidency.

With respect to the requirements set forth in Article 63(2) of the American Convention, the IACtHR has indicated that ‘gravity’ must be extreme, ‘that is, at its most intense or elevated degree’.<sup>15</sup> Urgency means that the risk of threat requires an immediate response. Regarding the irreparability, the Court has stated that ‘there must be reasonable probability that the damages will occur, and it must not involve assets or legal interests that can be repaired’.<sup>16</sup>

Most of the provisional measures adopted by the IACtHR aimed at protecting the life and personal integrity of individuals,<sup>17</sup> particularly those facing threats and detainees subjected to inhumane conditions of detention.<sup>18</sup> A

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5. The Court, or if the Court is not sitting, the Presidency, upon considering that it is possible and necessary, may require the State, the Commission, or the representatives of the beneficiaries to provide information on a request for provisional measures before deciding on the measure requested.
  6. If the Court is not sitting, the Presidency, in consultation with the Permanent Commission and, if possible, with the other Judges, shall call upon the State concerned to adopt such urgent measures as may be necessary to ensure the effectiveness of any provisional measures that may be ordered by the Court during its next period of sessions.
  7. The monitoring of urgent or provisional measures ordered shall be carried out through the submission of reports by the State and the filing of observations to those reports by the beneficiaries of the measures or their representatives. The Commission shall submit observations to the State’s reports and to the observations of the beneficiaries of the measures or their representatives.
  8. When the Court considers it appropriate, it may require from other sources of information any relevant data on the matter that would permit it to assess the gravity and urgency of the situation and the effectiveness of the measures. To that end, it may also require expert opinion and any other report that it considers appropriate.
  9. The Court, or its Presidency if the Court is not sitting, may convene the Commission, the beneficiaries of the measures or their representatives, and the State to a public or private hearing on provisional measures.
  10. In its Annual Report to the General Assembly, the Court shall include a statement concerning the provisional measures ordered during the period covered by the report. If those measures have not been duly implemented, the Court shall make such recommendations as it deems appropriate.

<sup>15</sup> *Four Ngöbe Indigenous Communities and their Members v Panama* (n 12) 8.

<sup>16</sup> *Four Ngöbe Indigenous Communities and their Members v Panama* (n 12) para 9–10.

<sup>17</sup> IACtHR, ‘Sistematización de las resoluciones sobre medidas provisionales emitidas por la Corte Interamericana de Derechos Humanos (Arts. 63.2 de la Convención Americana sobre Derechos Humanos y 27 del Reglamento de la Corte Interamericana)’ <https://www.corteidh.or.cr/docs/Sistematizacion.pdf>.

<sup>18</sup> Clara Burbano Herrera and Yves Haeck, ‘The Use of Transformative Provisional Measures by the Inter-American Court of Human Rights: Toward a Tangible Impact’ in Armin von Bogdandy and others (eds), *The Impact of the*

limited number of measures sought to protect these along with other rights, such as the right to family<sup>19</sup> and legal guarantees.<sup>20</sup> On a few occasions, the Court ordered states to stay domestic proceedings or to preserve rights whose violation would impair its own jurisdiction<sup>21</sup> or the ability of the Commission<sup>22</sup> to provide adequate reparations in a final decision on the merits of a contentious case. Most of these precedents relate to the suspension of the death penalty, one to the suspension of extradition proceedings,<sup>23</sup> and another to the suspension of a sentence against a journalist convicted of defamation.<sup>24</sup>

### **2.2.2 Precautionary measures of the Inter-American Commission on Human Rights**

The faculty to adopt precautionary measures was originally established in the 1980 Rules of Procedure of the Commission,<sup>25</sup> in the chapter on the individual complaint mechanism. Since the amendment of the IACHR Rules of Procedure in October 1996,<sup>26</sup> it has been regulated in a separate chapter, which

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*Inter-American Human Rights System: Transformations on the Ground* (Oxford University Press 2024).

<sup>19</sup> *Case of Haitian and Haitian-Origin Dominican Persons in the Dominican Republic*, Provisional Measures (18 August 2000) para 5.

<sup>20</sup> *Case of Ivcher-Bronstein (Peru)*, Provisional Measures (21 November 2000) paras 1–2.

<sup>21</sup> *Case of Tyrone DaCosta Cadongan (Barbados)*, Provisional Measures (2 December 2008). In this case, the Commission had issued precautionary measures to suspend the execution of the death penalty against Mr Tyrone DaCosta in order not to impede the processing of his case before the organs of the Inter-American system. After reaching a final decision on the merits of the case, the Commission submitted it to the jurisdiction of the IACtHR and requested provisional measures, which were initially granted by the President of the Court on 4 November and ratified by its plenary on 2 December 2008.

<sup>22</sup> *Case of La Nación Newspaper (Costa Rica)*, Provisional Measures (23 May, 7 and 8 September 2001, and 26 August 2002), in which the IACtHR granted provisional measures when the contentious case was still under the jurisdiction of the Commission and pending a final decision on the merits by this body. Under the same circumstances, see the provisional measure concerning the suspension of the death sentences in the *Case of James and Others* (Trinidad and Tobago). Order of 25 May 1999, decision para 2(b).

<sup>23</sup> *Wong Ho Wing v Peru*, Provisional Measures (28 May 2010).

<sup>24</sup> *Case of La Nación Newspaper (Costa Rica)*, Provisional Measures (21 May 2001).

<sup>25</sup> Rules of Procedure of the Inter-American Commission on Human Rights (1980) OEA/SER.L/V/II.49, para 26.

<sup>26</sup> IACHR Rules of Procedure (1996) OEA/SER.L/V/II.93, para 29.

seems to reflect the IACHR's practice of granting these measures either in connection with or independently of an individual complaint.

The Inter-American Convention on Forced Disappearance of Persons codifies the authority of the IACHR to issue precautionary measures,<sup>27</sup> which demonstrate the general practice of the OAS member states to acknowledge the binding nature of such measures.<sup>28</sup>

The vast majority of the precautionary measures granted by the IACHR over the past 25 years have been issued outside the context of a contentious case. Although they sought to protect a wide range of rights under the ACHR and other Inter-American instruments, the IACHR has increasingly limited these measures to situations of serious risk of irreparable harm to the life and physical integrity of persons.

### 3 INDIGENOUS TERRITORIAL RIGHTS UNDER THE INTER-AMERICAN STANDARDS

The case law of the IACtHR emphasizes the special relationship between the cultural integrity and identity of Indigenous peoples and other fundamental rights.<sup>29</sup> According to the IACHR's doctrine, this relationship 'extends beyond the settlement of specific villages to include lands that are used for agriculture, hunting, fishing, gathering, transportation, cultural and other purposes'.<sup>30</sup> The IACtHR has also stated that the traditional territory and its natural resources

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<sup>27</sup> Article XIII of the Inter-American Convention on Forced Disappearance of Persons states that: 'For the purposes of this Convention, the processing of petitions or communications presented to the Inter-American Commission on Human Rights alleging the forced disappearance of persons shall be subject to the procedures established in the American Convention on Human Rights and to the Statute and Regulations of the Inter-American Commission on Human Rights and to the Statute and Rules and Procedure of the Inter-American Court of Human Rights, including the provisions on precautionary measures'.

<sup>28</sup> The IACtHR has pointed out that the principle of good faith and the effectiveness of the Inter-American human rights system require states to respect its precautionary measures. See: *Case of James and Others (Trinidad and Tobago)*, Provisional Measures (26 September 2001).

<sup>29</sup> *Yakye Axa Indigenous Community v Paraguay* (Merits, Reparations and Costs) IACtHR Series C No. 125 (17 June 2005) para 131.

<sup>30</sup> *Maya Indigenous Communities of the Toledo District v Belize*, Report No. 40/04, Case 12.053 (12 October 2004) paras 129 and 155. See also: IACHR, 'Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia' OEA/Ser.L/V/II (28 June 2007) para 297.

are the condition for the material subsistence of Indigenous peoples and inherent to their spiritual values and cultural identity.<sup>31</sup>

According to the IACHR, 'ancestral cemeteries, places of religious meaning and importance, and ceremonial or ritual sites linked to the occupation and use of physical territories constitute an intrinsic part of the right to cultural identity'.<sup>32</sup> The IACtHR has stated that the 'possession of their traditional territory is indelibly recorded in their historical memory, and their relationship with the land is such that severing that tie entails the certain risk of an irreparable ethnic and cultural loss, with the ensuing loss of diversity'.<sup>33</sup>

In the 2012 *Case of the Kichwa Indigenous People of Sarayaku v Ecuador*, the IACtHR highlighted the link between the right to collective property and the cultural integrity of Indigenous peoples. According to the IACtHR, 'the right to cultural identity is a fundamental right – and one of a collective nature – of the Indigenous communities, which should be respected in a multicultural, pluralistic and democratic society'.<sup>34</sup>

### 3.1 Special Safeguards to Indigenous Territorial Rights

The IACtHR has defined property as the material things that can be possessed,<sup>35</sup> the rights incorporated in a person's patrimony,<sup>36</sup> and the intangible things that can have value.<sup>37</sup> This right is enshrined in Article 21 of the ACHR and Article XXIII of the American Declaration. Although these provisions do not mention Indigenous and tribal peoples, the organs of the IAHRs have stressed that both the private property of individuals and communal property of the Indigenous

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<sup>31</sup> *Sawhoymaxá Indigenous Community v Paraguay* (Merits, Reparations and Costs) IACtHR Series C No. 146 (29 March 2006) para 118; *Yakye Axa Indigenous Community v Paraguay* (n 29) 135.

<sup>32</sup> IACtHR, 'Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources' (30 December 2009) OEA/Ser.L/V/II, para 160.

<sup>33</sup> *Yakye Axa Indigenous Community v Paraguay* (n 29) para 216.

<sup>34</sup> *Kichwa Indigenous People of Sarayaku v Ecuador* (Merits and Reparations) IACtHR Series C No. 245 (27 June 2012) para 217.

<sup>35</sup> *Perozo and Others v Venezuela* (Preliminary Objections, Merits, Reparations, and Costs) IACtHR Series C No. 195 (28 January 2009) para 399; *Ivcher Bronstein v Peru* (Merits, Reparations and Costs) IACtHR Series C No. 74 (6 February 2001) para 122; *Salvador-Chiriboga v Ecuador* (Preliminary Objections and Merits) IACtHR Series C No. 179 (6 May 2008) para 55.

<sup>36</sup> *'Five Pensioners' v Peru* (Merits, Reparations and Costs) IACtHR Series C No. 98 (28 February 2003) para 102.

<sup>37</sup> *Salvador-Chiriboga v Ecuador* (n 35) 55.

communities are protected under Articles 21 of the American Convention<sup>38</sup> and XXIII of the Declaration.<sup>39</sup>

According to the Inter-American case law, the property rights of Indigenous and tribal peoples over their territories derive from customary land tenure, rather than from formal recognition.<sup>40</sup> In this sense, while states have an obligation to title and demarcate the traditional territories,<sup>41</sup> the exercise of collective property rights is not to be conditioned on these acts.<sup>42</sup>

When the property claims of Indigenous peoples collide with private property acquired in good faith by third parties, the IACtHR has examined whether the restriction to the communal property is justified. Its jurisprudence indicates that the right to collective property may be restricted if the state follows a pre-established law, if the restriction is necessary to achieve a legitimate aim, and if it is strictly proportional. In carrying out this test, the IACtHR has concluded that the ancestral land encompasses a broader concept linked to the cultural integrity of Indigenous peoples, the material subsistence of their members, and their very existence as an organized group.<sup>43</sup>

In line with the wording of Article 16(4) of International Labour Organization (ILO) Convention No. 169,<sup>44</sup> the IACtHR has maintained that when a state justifies the impossibility of restoring a traditional territory, it must compensate the Indigenous community with lands equivalent in size and quality. Compensation must be carried out under the consent of Indigenous peoples concerned ‘in accordance with their own mechanism of consultation, values, customs and customary law’.<sup>45</sup>

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<sup>38</sup> *Yakye Axa Indigenous Community v Paraguay* (n 29) 143.

<sup>39</sup> *Mary and Carrie Dann v United States*, IACHR Report No. 75/02, Case 11.1140 (27 December 2002) paras 44–52.

<sup>40</sup> *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (Merits, Reparations and Costs) IACtHR Series C No. 79 (31 August 2001) para 140(a).

<sup>41</sup> *Saramaka People v Suriname*, IACHR (28 November 2007) 115; *Yakye Axa Indigenous Community v Paraguay* (n 29) 143.

<sup>42</sup> *Saramaka People v Suriname* (n 41) 115; *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (n 40) para 153; *Yakye Axa Indigenous Community v Paraguay* (n 29) 215; *Moiwana Community v Suriname* (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No. 124 (15 June 2005) para 209.

<sup>43</sup> *Yakye Axa Indigenous Community v Paraguay* (n 29) 147.

<sup>44</sup> This provision states that ‘[w]hen such return is not possible ... these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees’.

<sup>45</sup> *Yakye Axa Indigenous Community v Paraguay* (n 29) 151.

In brief, the Inter-American jurisprudence establishes the following special guarantees for Indigenous territorial rights: (1) traditional tenure of a territory entails the same effect as a title of domain; (2) it also entitles the Indigenous community to request the official recognition and title of property; (3) Indigenous peoples involuntarily displaced from their traditional lands do not lose their property rights; (4) the acquisition of traditional lands by third parties in good faith does not circumvent the obligation of states to restore them to the members of the Indigenous community; and (5) when the impossibility of restoring the traditional lands is fully justified, the Indigenous community has the right to obtain lands similar in size and quality or to choose another form of compensation.<sup>46</sup>

The IACtHR has indicated that the special safeguards for Indigenous and tribal territories cannot be interpreted as a general prohibition on the concession of economic activities.<sup>47</sup> In addition to the requirements generally applied to the restriction of the right to property (legality, necessity, and strict proportionality), the restriction resulting from such a concession must not jeopardize

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<sup>46</sup> In the *Case of the Xucuru Indigenous People and its members v Brazil*, the IACtHR summarised the following special safeguards for the collective property of Indigenous peoples over their traditional territories: (1) the traditional possession of Indigenous peoples over their lands has the same effects as the title of full ownership granted by the State; (2) traditional possession grants the Indigenous peoples the right to require official recognition of ownership and its registration; (3) members of Indigenous peoples who, for reasons beyond their control, have left or lost possession of their traditional lands maintain the right to ownership of such lands, even without legal title, except when those lands have been legitimately transferred to third parties in good faith; (4) the State must delimit, demarcate, and grant collective title to the lands of the members of the Indigenous communities; (5) members of Indigenous peoples who, involuntarily, have lost the possession of their lands, and these have been transferred legitimately to third parties in good faith, have the right to recover them or to obtain other land of the same area and quality; (6) the State must ensure the effective ownership of the Indigenous peoples and refrain from taking actions that could result in agents of the State itself, or third parties acting with its acquiescence or tolerance, adversely affecting the existence, value, use, or enjoyment of their territory; (7) the State must ensure the right of the Indigenous peoples to control effectively and be owners of their territory without any type of external interference by third parties; and (8) the State must ensure the right of the Indigenous peoples to the control and use of their territory and natural resources [...].

See: *Xucuru Indigenous People and its members v Brazil* (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No. 346 (5 February 2017) para 117.

<sup>47</sup> *Saramaka People v Suriname* (n 41) 126.

the cultural integrity of the community and its subsistence as an organized group.<sup>48</sup> To achieve this objective, states must carry out a free and informed consultation prior to authorizing economic enterprises that affect Indigenous and tribal territories.<sup>49</sup> In addition, states must ensure that the affected communities receive fair benefits from these activities and that no concession is granted until an independent and technically qualified entity, acting under the supervision of the state, has conducted an assessment of the social and environmental impact of the project.<sup>50</sup>

With regard to large-scale projects with a deep impact on Indigenous territories, the IACtHR has established the obligation to obtain the mandatory consent of the affected communities, in accordance with their customs and traditions.<sup>51</sup> The Inter-American Commission has developed this obligation further, emphasizing concrete guidelines for determining when an investment project can be labelled as 'large-scale'. These guidelines include the magnitude of the project, the extent and intensity of its impact on the territory, and the human and social consequences of the activity. In this regard, the IACHR has concluded that 'industrial mining' and the exploitation of hydrocarbons

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<sup>48</sup> *ibid* para 128, quoting *Länsman and Others v Finlandia* App No. 511/1992, UN Doc CCPR/C/52/D/511/1994 (8 November 1994) para 9(4).

<sup>49</sup> For a comprehensive study of the Inter-American standards on the right to consultation and participation of Indigenous and tribal peoples in the decisions that affect their interests and territory see: IACHR, 'Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources' (n 32) Chapter IX.

<sup>50</sup> *Saramaka People v Suriname* (n 41) 129.

<sup>51</sup> *ibid* paras 134–7, citing Economic and Social Council (ESC), 'UN Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2001/65' (Fifty-ninth session) UN Doc E/CN.4/2003/90 (21 January 2003) paras 2 and 66; and United Nations Committee on the Elimination of Racial Discrimination (UNCERD), 'Consideration of Reports submitted by States Parties under Article 9 of the Convention, Concluding Observations on Ecuador' (Sixty-second session, 2003) UN Doc CERD/C/62/CO/2 (2 June 2003) para 16. It is important to mention that in the previous case of *Awás Tingni* the IACtHR indicated that as a state party to the ILO Convention No. 169, Nicaragua had the obligation to perform a prior consultation with the members of this community. In the case of *Saramaka People v Suriname* (n 41), whereby Suriname had not ratified ILO Convention No. 169, the IACtHR concluded that the obligation to obtain a previous, free, and informed consent derives from the American Convention and other instruments that constitute the international *corpus juris* on the rights of Indigenous peoples.

are concrete examples of large-scale activities that require the mandatory consent of the Indigenous and tribal peoples affected.<sup>52</sup>

## 4 INDIGENOUS PEOPLES' RIGHTS AND URGENT MEASURES IN THE INTER-AMERICAN SYSTEM

### 4.1 Precautionary Measures

Most of the precautionary measures granted by the IACHR in situations involving risks for Indigenous and tribal peoples have sought to protect the life and physical integrity of their members.<sup>53</sup>

By 2011, the IACHR had issued a significant number of precautionary measures, in the form of injunctions, to suspend domestic decisions that could cause irreparable harm to Indigenous communities and their territorial rights. Almost all of these measures were linked to a pending contentious case, and they sought to preserve the rights of the beneficiaries until the organs of the Inter-American system had the opportunity to adopt a final decision on the merits of the case. The only two exceptions to this approach occurred in July 2006, with the precautionary measure in favour of the Sitio El Rosario-Naranjo Maya Community in Guatemala, and in April 2011, with the precautionary measure regarding the Belo Monte hydroelectric dam, in Brazil.

The following subsections summarize the main aspects of the precautionary measures in favour of Indigenous and tribal peoples over the past 25 years.<sup>54</sup> Subsection 4.1.1 deals with precautionary measures that protect the life, physical integrity, and other related rights of Indigenous peoples, outside the scope of a contentious case. This is the most common situation in which the IACHR has granted and continues to grant precautionary measures to members of Indigenous and tribal peoples. Section 4.1.2 examines the precautionary measures that intend to suspend domestic proceedings that could affect Indigenous territorial rights, as an injunctive measure related to a contentious

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<sup>52</sup> IACHR, 'Indigenous Peoples, Afro-Descendant Communities, and Natural Resources: Protection of Human Rights in the Context of Extraction, Exploitation, and Development Activities' (31 December 2015) paras 185–93.

<sup>53</sup> The summary of the precautionary measures cited in this subsection was taken from the information available at the IACHR's web page: [www.cidh.oas.org/medidas.eng.htm](http://www.cidh.oas.org/medidas.eng.htm).

<sup>54</sup> The precautionary measures adopted after March 2013 contain a serial number, both in the resolution and in the precautionary measure (PM) registry. Older precautionary measures do not contain either of these serial numbers on the IACHR's webpage, and their identification is made by the date of issuance and the name of the beneficiary community.

case. Section 4.1.3 analyzes the two precedents in which the IACHR requested the suspension of a domestic decision outside the scope of a case.<sup>55</sup>

#### 4.1.1 Precautionary measures protecting the lives and physical integrity of Indigenous and tribal peoples

Most of these precautionary measures relate to threats, killings, and other acts of violence against members of Indigenous and tribal peoples. Many of them involve illegal armed groups, particularly in Colombia and Mexico. In some cases, the IACHR has concluded that the risk of irreparable harm is linked to the efforts of communities to obtain legal recognition of their lands or to their opposition to large-scale projects.

Some of the precautionary measures described in this subsection refer to the conditions of detention, torture, and lack of adequate medical care for Indigenous prisoners, particularly in Nicaragua. When the beneficiaries are Indigenous persons who are also human rights defenders, the IACHR usually requests states to ‘ensure that they can perform their work as human rights defenders without being subject to threats, harassment, or any other act of violence’.<sup>56</sup>

A smaller group of precautionary measures has been granted in the context of serious environmental damage caused by oil spills and harmful chemicals on Indigenous territories. In this scenario, the IACHR usually requests the state to stop the source of contamination, to provide the necessary medical examination and treatment, to clean up the affected areas, and to ensure adequate food and sanitation for the beneficiaries.

In recent years, the IACHR has added a standard sentence to some precautionary measures concerning Indigenous peoples, calling for ‘culturally appropriate measures to protect the life and personal integrity’ and to ‘agree upon the measures to be adopted with the beneficiaries and their representatives, taking into account the importance of safeguarding the cultural identity of the proposed beneficiaries’.<sup>57</sup>

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<sup>55</sup> For an analysis of how the IACHR has incorporated an intercultural approach in recent decisions on precautionary measures in favour of Indigenous peoples, see Antonia Urrejola and Elsy Curihuinca Neira, ‘Indigenous Rights in the Inter-American System: The Application of Precautionary Measures from a Culturally Appropriate Perspective’ in Armin von Bogdandy and others (eds), *The Impact of the Inter-American Human Rights System: Transformations on the Ground* (Oxford University Press 2024).

<sup>56</sup> See, e.g., Resolution No. 19/24, PM 73-24 – Thirteen members of the La Plata Bahía Málaga Community, Colombia.

<sup>57</sup> *ibid.*

Several measures protecting Indigenous communities have been issued under Article 25(3) of the IACHR's Rules of Procedure, which establishes that precautionary measures 'may be of a collective nature to prevent irreparable harm to persons due to their association with an organization, a group, or a community with identified or identifiable members'.<sup>58</sup> Indigenous and tribal communities, as well as persons deprived of their liberty in a particular detention centre, are the most common group to which the IACHR grants precautionary measures under Article 25(3) of its Rules, without the need to identify the individual beneficiaries.<sup>59</sup> However, the IACHR requires information that is precise enough to identify the beneficiaries in a given geographical area.

Between January 2003 and January 2025, the IACHR granted 76 precautionary measures<sup>60</sup> to protect the life and personal integrity of Indigenous and tribal communities as a collective group, their leaders, or their individual members.<sup>61</sup> A small number of these measures required states to

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<sup>58</sup> Krsticevic and Reggiardo, 'Artículo 25' (2023) *Comentario al Procedimiento ante el Sistema Interamericano de Derechos Humanos* 108 and 109.

<sup>59</sup> Prior to the 2013 amendment, the IACHR granted several collective precautionary measures to other non-Indigenous groups, such as human rights organizations, peasant and rural communities, media outlet workers, etc. Since 2013, the IACHR has adopted the general practice of granting measures in favour of the individual members of these groups rather than the organization, community, or entity to which they belong.

<sup>60</sup> It was not until March 2013 that the IACHR began to publish a resolution on the precautionary measures granted. Therefore, there is no mention of a resolution number for those measures issued between 2010 and 2012. On the other hand, the IACHR did not add serial numbers to the measures issued before 2008, due to which they are referred to in this chapter by means of the date of adoption and the names of the beneficiaries.

<sup>61</sup> These precautionary measures are the following: Res. No. 77/24 – Steadman Fagot Muller, Nicaragua; Res. No. 28/24 – Members of the Tapeba Indigenous People of Caucaia, Brazil; Res. No. 34/24 – Sonia Chilguese Dagua, Diana Montilla Moreno, and their families, Colombia; Res. No. 19/24 – Thirteen members of the La Plata Bahía Málaga Community, Colombia; Res. No. 13/24 – Selected families of the native Kichwa community Santa Rosillo de Yanayacu, Peru; Res. No. 12/24 – Cindy Vanessa Arenas Fernández and her family, Colombia; Res. No. 11/24 – J. Santos Rosales Contreras and twelve other members of the Nahua indigenous community of Ayotitlán, Mexico; Res. No. 83/23 – Tolupan indigenous members of the Movimiento Amplio por la Justicia y la Dignidad, Honduras; Res. No. 60/23 – Nancy Elizabeth Henríquez James, Nicaragua; Res. No. 59/23 – Brooklyn Rivera Bryan, Nicaragua; Res. No. 41/23 – Indigenous Carib Community of Chinese Landing, Guyana; Res. No. 27/23 – Álvaro Alcides Crespo Hernández and his daughter, Colombia; Res. No. 25/23 – Members of the Pataxó Indigenous People located in the Barra Velha and Comexatibá

Indigenous Lands in the state of Bahia, Brazil; Res. No. 20/23 – D.R.Z., D.A.B.A., A.C.L. and I.C.L., Nicaragua; Res. No. 10/23 – Members of the Boa Hora III/Marmorana Quilombola Territory, Brazil; Res. No. 70/22 – Jhon Anderson Ipia Bubu, Colombia; Res. No. 59/22 PM 449-22 – Identified members of the ‘União dos Povos Indígenas do Vale de Javari’, Brazil; Res. No. 50/22 – Members of the Guapoy’s community of the Guarani Kaiowá Indigenous People, Brazil; Res. No. 5/22 – Families of the Río Murindó and Río Chageradó Reservations of the Embera Eyábida Indigenous People, Colombia; Res. No. 105/21 – Families from the Mixteca Indigenous communities of Guerrero Grande and Ndoyonuyuji, et al., Mexico; Res. No. 53/21 – Yiner Hernán Quigüantar Cortés, Colombia; Res. No. 35/21 – Tsotsil Indigenous families from twelve communities in the municipality of Aldama, Chiapas, Mexico; Res. No. 32/21– Seven pregnant women of the Wichí ethnic group, Argentina; Res. No. 1/21 – Members of the Guajajara and Awá Indigenous Peoples of the Araribóia Indigenous Land, Brazil; Res. No. 94/20 – Munduruku Indigenous People, Brazil; Res. No. 81/20 – Members of the Indigenous Community of Santa Clara de Uchunya et al., Peru; Res. No. 67/20 – Poqomchi’ Mayan Indigenous Families of Washington and Dos Fuentes communities, Guatemala; Res. No. 44/20 – Quilombo Rio dos Macacos Community, Brazil; Res. No. 35/20 – Members of the Yanomami and Ye’kwana Indigenous Peoples, Brazil; Res. No. 47/19 – Guyraroká community of the Guarani Kaiowá Indigenous People, Brazil; Res. No. 33/19 – Quélvin Otoniel Jimenez Villalta, Guatemala; Res. No. 7/19 – Indigenous persons of the Pemón ethnic group in the San Francisco de Yuruaní, Venezuela; Res. No. 67/18 PM 807-18 – Yaku Pérez Guartambel, Ecuador; Res. No. 53/18 – Authorities and members of the Siona (ZioBain) Indigenous people’s reservations Gonzaya and Po Piyuya, Colombia; Res. No. 15/18 – Tsotsil Indigenous communities in Chalchihuitán and Chenalhó, Mexico; Res. No. 13/18 – Tsotsil Indigenous persons displaced from the Puebla communal land and members of the Ku’untik Center for Human Rights, Mexico; Res. No. 1/18 – Lucila Bettina Cruz and her family, Mexico; Res. No. 30/17 – Julio César Vélez Restrepo et al., Colombia; Res. No. 4/1 – Víctor Vásquez, Honduras; Res. No. 32/16 – Members of the Otomí-Mexica Indigenous Community of San Francisco Xochicuautla, Mexico; Res. No. 46/15 – Ana Miran Romero and Others, Honduras; Res. No. 37/15 – Members of the communities ‘Esperanza, Santa Clara, Nicaragua; Res. No. 15/15 P – Cruz Sánchez Lagarda and others, Mexico; Res. No. 29/14 – Prudencio Ramos Ramos and others, Mexico; PM 131/12 – Hernán Henry Díaz, Colombia; PM 60/12 – Members of the Triqui Indigenous Community in the San Pedro River Valley, San Juan Cópala, Putla de Guerrero, Oaxaca, Mexico; PM 255/11 – Nasa people of Toribio, San Francisco, Tacueyo, and Jambalo Reservations, Colombia; PM 61/11 – Members of the Awá Indigenous People of the Departments of Nariño and Putumayo, Colombia; PM 404/10 – Qom Navogoh Indigenous Community of ‘La Primavera,’ Argentina; PM 355/10 – 21 Families of the Nonam Community of the Wounaan Indigenous People, Colombia; PM 17/10 – Inhabitants of the community of Omoa, Honduras; PM 208-10 – Estela Ángeles Mondragón, Mexico; PM 347/09 – Members of the El Nogalito (Lule) community

take the necessary actions to ensure the safe return to their communities of beneficiaries displaced by acts of violence.<sup>62</sup>

Some older precautionary measures include a general request to protect 'the community's special relationship with its territory', in addition to the protection of the life and personal integrity of its members.<sup>63</sup>

There is a single precautionary measure outside the scope of a contentious case whereby the IACHR requested the prevention of irreparable harm to the life and physical integrity of the beneficiaries with a more specific order to demarcate an Indigenous territory. Adopted on 4 August 2010, the precautionary measures granted to the Mixteca Indigenous community of Lázaro Cárdenas in Oaxaca, Mexico, requested the Mexican state to 'remove the risk

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of Tucumán Province, Argentina; PM 61/11 – Members of the Awá Indigenous People of the Departments of Nariño and Putumayo, Colombia; PM 255/11 – Nasa people of Toribio, San Francisco, Tacueyo, and Jambalo Reservations, Colombia; PM 355/10 – 21 Families of the Nonam Community of the Wounaan Indigenous People, Colombia; PM 197/10 – 135 Inhabitants of San Juan Copala, Mexico; PM 102/10 – Inhabitants of the Mixteca Indigenous Community of Lázaro Cárdenas, Putla, Oaxaca, Mexico; PM 12/09 – Community of Alto Guayabal-Coredcito of the Emberá People, Colombia; PM 290/09 – Jesús Tecú Osorio and his family, Guatemala; PM 301/08 – Leaders of the Indigenous Regional Council of Cauca (CRIC) and their Advisers, Colombia; (August 20, 2007) – Marcos Bonifacio Castillo, member of the Garifuna Community of Punta Piedras, Honduras; (November 27, 2006) – The Union of Guarayo Native Peoples (COPNAG), Bolivia; (November 7, 2005) – Aura Lolita Chávez Ixcaquic, Guatemala; (March 11, 2005) – Tacana Indigenous Community of Miraflores, Riberalta, Bolivia; (January 14, 2005) – Obtilia Eugenio Manuel et al, Mexico; (December 6, 2004) – Indigenous Peoples Ingaricó, Macuxi, Wapichana, Patamona and Taurepang in Raposa Serra do Sol, Roraima State, Brazil; (October 14, 2004) – Holmes Enrique Fernández, Jorge Salazar and other members of the Cauca Association of Persons Displaced from the Naya, Colombia; (September 27, 2004) – Raúl Javier Gatica Bautista, Mexico; (September 23, 2004) – Women leaders of the Wayúu Indigenous people, Colombia; (August 17, 2004) – Community of San Mateo de Huanchor, Peru; (February 27, 2004) – Leonidas Iza, Ecuador; (October 3, 2003) – Amílcar Mendez, Guatemala; (October 2, 2003) – Members of 15 cabildos and resguardos of the Pijao Indigenous people, Colombia; (September 24, 2003) – Kankuamo Indigenous people, Colombia; (August 11, 2003) – Rosalina Tuyuc, Guatemala; (May 5, 2003) – Members of the Sarayaku Indigenous community.

<sup>62</sup> See, e.g., Resolution No. 13/24, PM 1109-23 – Selected families of the native Kichwa community Santa Rosillo de Yanayacu, Peru.

<sup>63</sup> This language was included, for example, in the precautionary measure issued on 5 May 2003, in favour of the members of the Sarayaku Indigenous people in Ecuador; on 24 September 2003, to the Kankuamo Indigenous peoples in Colombia; and on 4 February 2005, to the Wiwa Indigenous people of Colombia.

factors tied to the demarcation of lands<sup>64</sup> claimed by the beneficiary community. Although this precedent did not elaborate on the protection of territorial rights, it made clear that the root cause of the violence faced by the beneficiaries was a land dispute with another Indigenous community, and that Mexico should address this issue to reduce the risk of irreparable harm to the lives and physical integrity of the beneficiaries.

*Protection of life and personal integrity in the context of eviction and displacement*

Between January 2001 and January 2025, the IACHR granted 12 precautionary measures to Indigenous and tribal peoples at risk of violent displacement or eviction from their territories. These measures do not address concrete territorial rights and are limited to the protection of life, physical integrity, and, to a lesser extent, freedom of movement.<sup>65</sup>

Most of these measures were aimed at alleviating the humanitarian conditions caused by the enforcement of eviction orders. Five precedents requested the states concerned to enable the beneficiary community or its individual members to return to their traditional lands under safe conditions.<sup>66</sup> The precautionary measures issued on 26 September 2001, in favour of the Yakye Axa Indigenous Community in Paraguay, are the only precedent ever granted outside the context of a contentious case that combines the protection of the life and personal integrity with the suspension of a judicial eviction order.

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<sup>64</sup> PM 102/10 – Inhabitants of the Mixteca Indigenous Community of Lázaro Cárdenas, Putla, Oaxaca, Mexico.

<sup>65</sup> These measures are the following: Res. No. 28/24 – Members of the Tapeba Indigenous People of Caucaia, Brazil; Res. No. 62/23 – Triqui families from the Community of Tierra Blanca Cópala who have been displaced to the neighbouring community of Yosoyuxi Copala, Mexico; Res. No. 43/18, PM 44-18 – Maya Q'eqchi' community La Cumbre Sa'kuxhá, Guatemala; Res. No. 7/18, PM 872-17 – Maya Q'eqchi' community Nueva Semuy Chacchilla, Guatemala; Res. No. 3/18, PM 860-17 – Indigenous families of the Chaab'íl Ch'och' community, Guatemala; PM 255/11 – Nasa people of Toribio, San Francisco, Tacueyo, and Jambalo Reservations, Colombia; PM 121/11 – 14 Q'echi Indigenous Communities of the Municipality of Panzós, Guatemala; PM 321/10 – Rapa Nui Indigenous People, Chile; PM 355/10 – 21 Families of the Nonam Community of the Wounaan Indigenous People, Colombia; PM 118/09 – Naso Indigenous People of the Bocas del Toro Region, Panama; (October 12, 2004) – Indigenous Community Kelyenmagategma of the Enxet People, Paraguay; (September 26, 2001) – Yakye Axa Indigenous Community, Paraguay.

<sup>66</sup> These precedents are: Resolution No. 28/24, Resolution No. 62/23, PM 255-11, PM 355-10 and Indigenous Community Kelyenmagategma of the Enxet People.

*Protection of life and physical integrity of voluntary isolated communities*

By January 2025, the IACHR had issued three precautionary measures to Indigenous communities in voluntary isolation. Although their main purpose was to protect the lives and physical integrity of the beneficiaries, they also asked the states concerned to guarantee the intangibility of the territories inhabited by self-isolated communities. Their unique situation of vulnerability seems to justify precautionary measures aimed at preventing the intrusion into their territory, which could lead to violent clashes, the spread of deadly diseases, and, ultimately, the extermination of these communities. The content of the precautionary measures adopted under this approach can be outlined as follows:

RESOLUTION No. 4/16 PM 54-13 – MATTER OF COMMUNITIES IN VOLUNTARY ISOLATION OF THE AYOREO TOTOBIEGOSODE PEOPLE, PARAGUAY

On 3 February 2016, the IACHR granted precautionary measures to protect these communities in voluntary isolation; to avoid deforestation; to create a mechanism to protect and prevent third parties from entering their lands; and to elaborate specific protocols, based on international standards, to avoid unwanted contact with the beneficiaries.

INDIGENOUS PEOPLES OF MASHCO PIRO, YORA, AND AMAHUACA, PERU

On 22 March 2007, the IACHR granted precautionary measures and asked Peru to prevent irreparable harm to the life and personal integrity of these communities, resulting from the illegal logging and the presence of third persons in their territories.

TAGAERI AND TAROMENAMI INDIGENOUS PEOPLES, ECUADOR

On 10 May 2006, the IACHR granted precautionary measures for these peoples in voluntary isolation. Members of the Taromenami tribe were allegedly murdered on 26 April 2006, during reprisals linked to illegal logging in the Yasuní Park. Ecuador was asked to protect the territory inhabited by the beneficiaries from third party invasions.

In addition to these three precedents, a fourth precautionary measure was granted in April 2011 in the *Belo Monte* case regarding Brazil, aimed at protecting the intangibility of self-isolated Indigenous peoples and the life and physical integrity of several other contacted communities. This precedent is discussed in subsection 4.1.2, as it contains additional elements that go beyond the scope of the three measures described in this subsection.

#### 4.1.2 Precautionary measures requesting the stay of domestic decisions, adopted in the context of a contentious case

From the mid-1990s until early 2011, the IACHR issued eight precautionary measures ordering the suspension of large-scale projects in Indigenous peoples' territories. These orders are similar to injunctive measures in domestic procedural law, as well as interim/provisional measures indicated by other international adjudicative bodies. The Commission's eight precedents can be summarised as follows:

*PM 269/08 – Members of the Lof Paichil Antriao Community of the Mapuche Indigenous People, Argentina*

On 6 April 2011, the IACHR granted precautionary measures for the members of the Lof Paichil Antriao community of the Mapuche Indigenous people, who faced a risk of irreparable harm stemming from acts of harassment and of the destruction of their sacred place known as a Rewe, due to a large-scale project construction underway in their territory. The request alleged that while the Rewe is currently being protected by a domestic legal measure, the members of the community had not been able to access the site to practise their rituals. The IACHR asked Argentina to adopt the necessary measures so that the protective legal measure to prevent alteration of the Rewe is not lifted until the IACHR has ruled on the merits of Petition 962-08. The IACHR also requested the State to ensure effective compliance with the aforementioned legal measure.

*PM 105/11 – Communities of the Kuna of Madungandí and Emberá of Bayano Peoples, Panama*

On 5 April 2011, the IACHR granted precautionary measures for the Kuna of Madungandí and Emberá of Bayano peoples, in Panama. The measure was connected to Case 12.354, whose Admissibility Report No. 58/09 had been approved on 21 April 2009. The request alleged that in February and March of 2011 there were massive intrusions into the territories of the Kuna of Madungandí and Emberá of Bayano Indigenous reserve. It asserted that colonists violently seized and destroyed primary forests used by the Indigenous communities to ensure their food supply. The IACHR requested Panama to protect the ancestral territory of the Kuna of Madungandí and Emberá of Bayano peoples from intrusions by third parties and from the destruction of their forests and crops, until such time as it adopts a final decision on the merits of Case 12.354.

*PM 395-09 – Maho Indigenous Community, Suriname*

On October 27, 2010, the IACHR granted precautionary measures for the inhabitants of the Maho Indigenous Community, in Suriname. The request alleged that since 1990 third parties have been encroaching upon the land reserved for the Maho Community in 1971. It also maintained that the invaders destroyed the community's crops and threatened its members. The IACHR asked Suriname to ensure

the presence of the Maho Community in the land that was reserved for them, free from incursions from third persons, until it adopts a decision on the merits of an individual complaint filed along with the request for precautionary measure.

*PM 260-07 – Communities of the Maya People (Sipakapense and Mam) of the Sipacapa and San Miguel Ixtahuacán Municipalities in the Department of San Marcos, Guatemala*

On 20 May 2010, the IACHR adopted precautionary measures for the members of 18 communities of the Maya Indigenous people in Guatemala. In November 2003 the Ministry of Energy and Mines granted the Montana company a licence to mine for gold and silver for 25 years in the municipalities of Sipacapa and San Miguel Ixtahuacán. The petitioners alleged that mining began without a prior, complete, free, and informed consultation with the affected communities. The mining allegedly produced serious consequences for the life, personal integrity, environment, and property of the affected Indigenous people. Guatemala was asked to suspend the operations of the project and to implement effective measures to prevent environmental contamination, until such time as the IACHR adopts a decision on the merits of the petition associated with the request for precautionary measures. It was also asked to decontaminate the water sources of the beneficiary communities and to ensure their members access to water fit for human consumption and to begin a health care and assistance program for the beneficiaries.

*PM 56/08 – Ngöbe Indigenous Communities and Others, Panama*

On 18 June 2009, the IACHR granted precautionary measures for members of the Indigenous communities of the Ngöbe people. The request alleged that a 20-year concession was granted to a company to build hydroelectric dams along the Teribe-Changuinola River. One of the dams would flood an area inhabited by four Ngöbe Indigenous communities. The petitioners alleged that the lands affected by the dam are part of their ancestral territory, used to carry out their traditional hunting and fishing activities. The IACHR requested Panama to suspend the construction until it adopts a final decision on a related contentious case. The IACHR also asked Panama to guarantee the free circulation, life, and physical integrity of the members of the Ngöbe community, and to prevent acts of violence or intimidation. As explained below, on 19 January 2010, the IACHR requested provisional measures on this matter, but the IACtHR dismissed the request.

*Garifuna Community of San Juan, Honduras*

On 7 July 2006, the IACHR granted precautionary measures for the Garifuna community of San Juan, in Honduras. The situation of this Indigenous community *vis-à-vis* the conflicts related to ownership of their ancestral lands was the subject of a petition being processed by the IACHR. The IACHR asked Honduras to adopt the necessary measures to protect the lives and personal integrity of the leaders of the community, to protect the right to ownership of said lands, and to suspend the implementation of any judicial or administrative action that could affect the rights

derived from the beneficiary community's ancestral property, until such time as it adopts a final decision with respect to Petition 674-06.

#### *Garifuna Community of Triunfo de la Cruz, Honduras*

On 28 April 2006, the IACHR granted precautionary measures for the Garifuna community of Triunfo de la Cruz, in Honduras. The situation of this Indigenous community *vis-à-vis* the conflicts related to ownership of their ancestral lands was the subject of a petition being processed by the IACHR. Honduras was asked to suspend the implementation of any judicial or administrative action that could affect the rights derived from the beneficiary community's ancestral territory, until such time as the bodies of the Inter-American system adopt a final decision with respect to the contentious case.

#### *Mercedes Julia Huenteao and Others, Chile*

On 1 August 2003, the IACHR granted precautionary measures in favour of five Pehuenche Indigenous women in Chile. The individual complaint associated with the request alleged that the state was carrying out a project to install a hydroelectric dam that would adversely affect the ancestral territory inhabited by the proposed beneficiaries. Chile was asked to abstain from undertaking any action that would modify the *status quo* of the matter until such time as it could adopt a decision on the merits of the case. The Commission also requested Chile to avoid or suspend any judicial or administrative action that would imply the displacement of the beneficiaries from their traditional land. On 11 March 2004, the IACHR approved a friendly settlement report in this case.

This list shows a consistent practice of issuing precautionary measures to preserve Indigenous territorial rights. April 2011 was the last time that the IACHR followed this practice, as explained in the following subsection.

#### **4.1.3 Precautionary measures requesting the suspension of domestic decisions in the absence of a related contentious case**

There are only two precedents under this category, the most controversial of which took place in April 2011. It refers to the precautionary measure granted to suspend the construction of a hydroelectric dam on the Xingu River in Brazil, one of the country's largest, located in the heart of the Amazon forest. This project, known as Belo Monte, had a devastating impact on a number of Indigenous communities whose physical and cultural existence depends on the conservation of the Xingu River's basin and its wildlife. The IACHR asked Brazil to suspend the approval of the project, even though there was no underlying petition or case under its jurisdiction. This decision went beyond the scope of the eight precedents described in the previous subsection, all of which were framed as injunctions to ensure the *effet utile* of a future decision on the merits of a related contentious case.

The second precedent dates from July 2006, in an atypical circumstance in which the Government of Guatemala did not oppose the adoption of precautionary measures. These are the main aspects of this second precedent.

*Maya Sitio El Rosario-Naranjo Community, Guatemala*

On 14 July 2006, the IACHR granted precautionary measures in favour of the Sitio El Rosario-Naranjo Community, identified as an archaeological monument and sacred place for those who practice Mayan spirituality. According to the request, the area of El Rosario-Naranjo had been titled to private actors who began to build a housing project and commissioned a study that proposed a significant reduction of the Indigenous sacred land. The Guatemalan Supreme Court declared that the construction in El Rosario-Naranjo would interfere with Mayan religious and social celebrations and ordered the construction to stop. However, this ruling was not complied with. After being notified by the IACHR on the request for precautionary measures, the Guatemalan government stressed that there was nothing to prevent the IACHR from intervening, given the disregard for the Supreme Court's ruling by private actors. Considering this, the Inter-American Commission asked the state of Guatemala to take the necessary measures to suspend any housing project in the Rosario-Naranjo Archaeological Center.

Given the government's endorsement and other unique circumstances surrounding this decision, it can be concluded that the Belo Monte precautionary measure regarding Brazil is the only precedent in which the IACHR has requested the suspension of a domestic decision affecting Indigenous territorial rights outside the scope of an underlying contentious case. The legal justification for this decision is as follows:

*PM 382/10 – Indigenous Communities of the Xingu River Basin, Pará, Brazil*

On 1 April 2011, the IACHR granted precautionary measures to 10 Indigenous communities living in the Xingu River basin in the state of Pará, Brazil, as well as to communities in voluntary isolation in the area. It was alleged that the lives and physical integrity of the beneficiaries were at risk due to the construction of the Belo Monte hydroelectric dam in the region. Brazil was asked to suspend the permitting process for the Belo Monte project until it (1) conducts a prior consultation – free, informed, in good faith, culturally appropriate, and with the aim of reaching an agreement – with each of the affected Indigenous communities that are beneficiaries of these precautionary measures; (2) ensure that the Indigenous communities have access to the project's social and environmental impact study, in an accessible format, including translation into the respective Indigenous languages; (3) adopt measures to protect the life and physical integrity of the members of the Indigenous peoples living in voluntary

isolation of the Xingu Basin, and to prevent the spread of diseases among them.<sup>67</sup>

On 29 July 2011, the IACHR modified its order, and requested that the State: (1) adopt measures to protect the life, health, and physical integrity of the members of the Indigenous communities who are in voluntary isolation; (2) ensure that the pending process of titling the ancestral lands of the Indigenous peoples of the Xingu Basin is completed soon; and (3) adopt effective measures to protect these ancestral lands from invasion and occupation by non-Indigenous people. The IACHR decided that the controversy over the alleged lack of prior consultation and consent has turned into a discussion on the merits of an individual complaint filed after the original decision of 1 April 2011, for which this aspect was removed from the precautionary measure.

The Belo Monte precedent triggered a sharp reaction from the Brazilian government at the time. The then-president, Dilma Rousseff, withdrew her ambassador to the OAS and froze all financial contributions to the organization.<sup>68</sup> Brazil's response fuelled a hostile diplomatic environment, led by other countries dissatisfied with certain decisions of the IACHR, such as Ecuador, Bolivia, and Venezuela.<sup>69</sup>

Created in 2011 by the OAS Permanent Council, the 'Special Working Group to Reflect on the Work of the Inter-American Commission on Human Rights with a view to Strengthening the Inter-American System for the Protection of Human Rights'<sup>70</sup> galvanized a kind of collective diplomatic catharsis against the IACHR. This process led the Inter-American Commission to make one of

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<sup>67</sup> According to public information, the Belo Monte hydroelectric complex would be the third biggest in the world with a capacity to generate more than 11,000 GW of electricity every year. For more information on the Belo Monte hydroelectric plant see: Tom Phillips, 'Brazil to build controversial Belo Monte hydroelectric dam in Amazon rainforest', *The Guardian* (London, 2 February 2010) [www.guardian.co.uk/environment/2010/feb/02/brazil-amazon-rainforest-hydroelectric-dam](http://www.guardian.co.uk/environment/2010/feb/02/brazil-amazon-rainforest-hydroelectric-dam).

<sup>68</sup> For a detailed account of the Brazilian government's response to the Belo Monte's precautionary measures, see: Amazon Watch, 'Brazil Green Lights Controversial Amazon Dam, Steamrolling Environmental Laws and Human Rights' (*Amazon Watch*, 1 June 2011) <http://amazonwatch.org/news/2011/0601-brazil-green-lights-controversial-amazon-dam>.

<sup>69</sup> For a detailed description of the effects of the diplomatic turmoil against the IACHR that took place between 2011 and 2013 and its impact on how the Inter-American body changed its institutional policies, see: Cerqueira and Salazar, 'The Functions of the Inter-American Commission on Human Rights Before, During, and After the Strengthening Process' (n 10) 129.

<sup>70</sup> OAS, 'Report of the Special Working Group to Reflect on the Workings of the Inter-American Commission on Human Rights with a view to Strengthening

the most comprehensive changes to its Rules of Procedure and institutional policies in its history.<sup>71</sup> By acceding to several demands of dissatisfied governments, the IACHR managed to avoid a more dangerous move towards a reform to inter-state instruments, such as the American Convention and its Statute.

Although the so-called strengthening process was triggered by several factors that went beyond the IACHR's practice on precautionary measures, it forced this body to limit the situations in which it grants such measures. Article 25 of its Rules of Procedure was significantly modified, introducing additional procedural requirements and stricter rules for granting these measures.<sup>72</sup> Clearly, one of the consequences of the 'strengthening process' was the IACHR's new practice of refraining from issuing precautionary measures to suspend large-scale projects in Indigenous and tribal territories, even when they are related to contentious cases alleging foreseeable, serious, and irreparable harm. This change has deprived hundreds of peoples and communities of an important tool to protect their territorial rights at the IAHRs.

## 4.2 Provisional Measures of the Inter-American Court of Human Rights

Compared to the IACHR's precautionary measures, the IACtHR has issued far fewer provisional measures concerning Indigenous peoples.<sup>73</sup> As of January 2025, the Inter-American Court had granted eight measures, all of which are

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the Inter-American System for the Protection of Human Rights' (13 December 2011) OEA/Ser.G, GT/SIDH-13/11 rev. 2.

<sup>71</sup> See: IACHR Resolution 1/13, 'Reform of the Rules of Procedure, Policies and Practices' <http://www.oas.org/en/iachr/mandate/strengthening.asp>.

<sup>72</sup> During the strengthening process, some ambassadors and the Secretary-General of the OAS challenged the very binding nature of the precautionary measures, suggesting that this faculty should be regulated through an inter-state instrument, such as the IACHR Statute or the American Convention, and not by the Rules of Procedure of the Commission. Some of these statements are available in Portuguese at: <http://g1.globo.com/brasil/noticia/2011/05/comissao-da-oea-deve-revisar-decisao-sobre-belo-monte-diz-secretario-geral.html>.

<sup>73</sup> Unlike the IACHR, the IACtHR publishes resolutions rejecting provisional measures requests. There are four resolutions of this kind, related to the rights of Indigenous peoples. These are: *Case of the Tagaeri and Taromenane Indigenous Peoples v Ecuador* (Order of 18 October 2022); *Case of two girls of the Taromenane indigenous people in voluntary isolation v Ecuador* (Order of 31 March 2014); *Case of Garífuna Community of Barra Vieja regarding Honduras* (Order of 14 October 2014); *Case of Four Ngöbe Indigenous Communities and its members regarding Panama* (Order of 28 May 2010).

limited to protecting the right to life and personal integrity of Indigenous peoples.<sup>74</sup>

Most of these precedents were adopted in the context of acts of violence, many of which were committed by illegal armed groups and other non-state actors. Only one precedent relates to the situation of Indigenous persons deprived of their liberty (*Matter of four Mayangna Indigenous in Nicaragua*) and two relate to the situation of Indigenous peoples displaced from their traditional lands. In some measures concerning the forcible displacement of Indigenous communities, the states concerned were ordered to ‘protect the territorial integrity and cultural identity’ and to protect ‘the rights to life and personal integrity of the [beneficiary communities ...] ensuring the safety of their belongings and crops abandoned in the communities during their displacement, and the necessary measures for their safe return’.<sup>75</sup>

In the case of the Indigenous people of Kankuamo in Colombia, the IACHR had requested the Inter-American Court to adopt provisional measures to ‘[p]rotect the life and the integrity of persons of the members of the Kankuamo Indigenous people in the Sierra Nevada de Santa Marta, and respect their cultural identity and their special relationship with their ancestral territory’.<sup>76</sup> The IACTHR granted such measures and added a more specific order to protect the right to freedom of movement and to ensure that the displaced beneficiaries could safely return to their ancestral lands.<sup>77</sup>

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<sup>74</sup> These provisional measures are: *Matter of four Mayangna Indigenous persons deprived of liberty regarding Nicaragua* (Order of 27 June 2023); *Matter of Members of the Miskitu and Mayangna Indigenous Peoples of the North Caribbean Coast regarding Nicaragua* (Order of 27 June 2023); *Matter of members of the Yanomami, Ye'kwana and Munduruku Indigenous Peoples regarding Brazil* (Order of 1 July 2022); *Matter of members of the Choréachi Indigenous Community regarding Mexico* (Order of 25 March 2017); *Matter of Members of the Miskitu Indigenous Peoples of the North Caribbean Coast regarding Nicaragua* (Order of 1 September 2016); *Matter of Kichwa Indigenous People of Sarayaku regarding Ecuador* (Order of Human Rights of 6 July 2004); *Matter of Indigenous Community Kankuamo regarding Colombia* (Order of 5 July 2004); *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua* (Order of 6 September 2002).

<sup>75</sup> See, e.g.: *Members of the Miskitu and Mayangna Indigenous Peoples of the North Caribbean Coast regarding Nicaragua*, Extension of Provisional Measures (Order of the Inter-American Court of Human Rights of 27 June 2023 and initial Order of provisional measures of 1 September 2016).

<sup>76</sup> *Case of Kankuamo (Colombia)*, Provisional Measures (Order of 5 July 2004) considering para 1.

<sup>77</sup> *ibid* paras 1 and 3. The cited requests were reiterated by the IACTHR in its order of 3 April 2009.

On 15 June 2004, the Commission made a similar request for provisional measures to protect the lives, personal integrity and special relationship of members of the Kichwa Indigenous people of Sarayaku to their territory in Ecuador.<sup>78</sup> After addressing the alleged arbitrary detentions, shootings, beatings, threats, and roadblocks within the Sarayaku territory, the IACtHR called on Ecuador to:

adopt, forthwith, the measures necessary to protect the life and integrity of person of the members of the Kichwa Indigenous community of Sarayaku and of those who represent and defend them in proceedings ordered before the authorities ... [and] to guarantee the right to freedom of movement of the members of the Kichwa community of Sarayaku.<sup>79</sup>

The Kankuamo and Sarayaku precedents combine a general order to protect life and physical integrity with a more specific order to protect the special safeguards of Indigenous territories. It should be noted that the subsidiary protection of territorial rights in these precedents was not framed as an injunction, i.e., they did not order the suspension of decisions of a state that could cause irreparable harm. The only request for provisional measures in which the IACHR asked the Court to do so is the *Matter of Four Ngöbe Indigenous Communities and their Members regarding Panama*, which was ultimately rejected by the Court.

On 19 January 2010, the IACHR submitted this request to the IACtHR, claiming that Panama had failed to comply with its 18 June 2009 precautionary measures.<sup>80</sup> The IACtHR dismissed the request on the grounds that the Commission failed to prove several aspects of its claim, such as:

- a. the alleged death threats or acts of police repression against the leaders of certain communities, given that there is no precise data after August 2009, that is, after the start of the agreements between the State, the company and the communities;
- b. the problems that would result from the deforestation methodology currently implemented, as well as with regards [sic] to the flood that would affect the resettlement of the community's members;

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<sup>78</sup> *Case of Pueblo Indígena Sarayaku (Ecuador)*, Provisional Measures (Order of 6 July 2004) considering para 1.

<sup>79</sup> *ibid* paras 1 and 2. In its orders of 17 June 2005 and 4 February 2010, the Court reiterated the provisional measures and, additionally, called upon the Ecuadorian state to 'promptly and effectively remove the explosive material buried in the territory where said community is settled'.

<sup>80</sup> *Case of Four Ngöbe Indigenous Communities and their Members v Panama*, Provisional Measures (Order of 28 May 2010) para 1.

- c. the apparent conformity expressed by several members of the Indigenous communities in relation to the lands offered and, in certain cases, already granted for their resettlement;
- d. [...]
- e. the alleged restrictions to freedom of movement and to the traditional mobility of the members of the Ngöbe community, considering the lack of claims regarding the manner in which the deforestation is performed, and in relation to that recently reported by the State on Changuinola River.<sup>81</sup>

The IACtHR pointed out that some of the arguments raised by the Commission ‘seemed to refer to the merits of the case’, such as the allegation that agreements were signed by leaders of the community under coercion and that the communities were subjected to restrictions on their freedom of movement within their territory. In assessing these allegations, the Court emphasized that in a request for provisional measures, ‘it cannot consider any argument that is not strictly related with the extreme gravity, urgency and need to avoid irreparable damages to individuals [and] any other issue should be resolved within the respective contentious case’.<sup>82</sup>

In its analysis of the urgency of the situation, the Court noted that the Commission had received an individual complaint in favour of the Ngöbe communities on 7 March 2008, but did not file the request for provisional measures until almost two years later, on 19 January 2010. The IACtHR concluded that ‘the Inter-American Commission should proceed with greater speed on the decision on this petition. On the contrary, there would be an inconsistency in that the urgency claimed to request provisional measures does not imply an urgent consideration regarding the assessment of merits of the petition’.<sup>83</sup>

Although the Court’s resolution on the *Ngöbe communities matter v Panama* is not clear on whether provisional measures are an appropriate mechanism to suspend decisions with significant impacts on Indigenous territories, it does include a very high threshold of corroboration for the proposed beneficiaries and their representatives.

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<sup>81</sup> *Case of Four Ngöbe Indigenous Communities and their Members v Panama* (n 80) considering para 11.

<sup>82</sup> *ibid.*, considering para 13.

<sup>83</sup> *ibid.*, considering para 16.

## 5 POSSIBLE STEPS TO IMPROVE THE PROTECTION OF INDIGENOUS PEOPLES' TERRITORIAL RIGHTS IN THE INTER-AMERICAN SYSTEM

According to the current approach of the IACHR, the allegations concerning Indigenous territorial rights are outside the scope of the precautionary measure's mechanism and are intrinsically tied to an analysis on the merits of a contentious case.<sup>84</sup> A recent resolution on the precautionary measure granted to the Indigenous Carab communities in Guyana summarizes this position as follows:

[...] both applicants and State have presented arguments regarding the recognition of land ownership in favour of the proposed beneficiaries and the extension of rights derived from it, as well as the legality of the mine exploitation by third parties [...] *the IACHR adverts that they require an analysis of (sic) merits to determine possible violations of the American Declaration of the Rights and Duties of Man and therefore, fall outside the scope of the present precautionary measures procedure.* As indicated above, this is better suited to be addressed by the Petition and Case system. The analysis that follows relates exclusively to the alleged serious and urgent situations presenting a risk of irreparable harm, which can be resolved without making any determinations on the merits.<sup>85</sup>

This reasoning is problematic, since there is no need to anticipate a conclusion on the merits of a case in dispute in these urgent measures framed as an injunction. The IACHR could issue this type of measure – as it did until 2011 – and then conclude that the alleged violations raised in the contentious case were not substantiated. The underlying petition or case could also be dismissed for failure to comply with the admissibility requirements set forth in Article 28 of its Rules of Procedure. The logical consequence of the dismissal of the petition either on admissibility or on the merits would be the lifting of the precautionary measures previously granted.

Depending on the magnitude of the harm that the state's decision may cause, the rejection of a precautionary measure may render the reparations adopted

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<sup>84</sup> See, e.g., IACHR Resolution No. 83/23, PM 416-13 – Tolupan indigenous members of the Movimiento Amplio por la Justicia y la Dignidad (Broad Movement for Justice and Dignity), Honduras, para 54; and IACtHR Resolution 88/2021, Precautionary Measures Nos 405-09, 112-16, 405-09, and 112-16, *Case of Berta Isabel Cáceres, her family unit, members of COPINH and Others v Honduras*, para 80.

<sup>85</sup> IACHR Resolution No. 41/23 PM 196-23, Indigenous Carib Community of Chinese Landing, Guyana, para 49. The italicized text has been added to the original version.

on the merits moot. This is particularly true in situations involving large-scale extraction of natural resources. As explained previously, Inter-American standards acknowledge the special relationship of Indigenous and tribal peoples to their ancestral territories, which is a prerequisite for the exercise of other fundamental rights, including their physical and cultural integrity.<sup>86</sup> Simply put, the IACHR has excluded the protection of these rights from the precautionary measure mechanism without any reasonable explanation as to how they could be redressed if the state proceeds with certain large-scale projects.

The flaws in the current IACHR's reasoning are also evident when we evaluate the precautionary measures of an injunctive nature that are regularly granted to suspend state decisions in other circumstances. The IACHR has granted several measures of this type, for instance, to stay the enforcement of death penalties, when there is a related contentious case pending a final decision. The purpose of these measures is to preserve the Commission's jurisdiction over a petition or case, since the reparations established for potential human rights violations will not be achieved if the proposed beneficiary/alleged victim is ultimately executed.<sup>87</sup> Despite the various factual and legal

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<sup>86</sup> In the matter of the Guapoy's community of the Guarani Kaiowá Indigenous People regarding Brazil, the IACHR outlined these standards as follows: '[...] in the case of indigenous peoples, the lack of access to land and natural resources can lead to conditions of misery for the indigenous communities concerned, since the lack of possession of and access to their territories prevents them from using and enjoying the natural resources they need to provide themselves with the goods necessary for their subsistence. The foregoing impacts on the conditions for a dignified life, given that for indigenous peoples, the lack of access to their ancestral territory causes them suffering, and damages the preservation of their ways of life, customs and language'. See: IACHR Resolution No. 50/2022, PM 517-22, Members of the Guapoy's community of the Guarani Kaiowá Indigenous People regarding Brazil, 2 October 2022, para 35.

<sup>87</sup> Strictly speaking, the death penalty does not violate Inter-American standards per se in those countries – such as the United States and some Caribbean nations – that have not ratified the American Convention and its Optional Protocol on the Abolition of the Death Penalty. However, in virtually all the merits reports on death penalty cases – most of which involve the United States – the Commission has concluded that either the method of execution, the domestic process, or both, violate the guarantees protected by the American Declaration. Likewise, the merits reports adopted by the IACHR and the rulings issued by the IACtHR on cases related to large-scale projects in Indigenous territories have all established violations of fundamental rights related to the special relationship of Indigenous and tribal communities with their traditional territories, which has been the subject of serious harm. In this sense, it is worth asking whether the reparations established in these merits reports and judgments could not be implemented due to irreparable

differences between precautionary measures suspending the execution of the death penalty and those suspending state decisions with significant impact on Indigenous territories, they are equally grounded on the need to preserve the *effet utile* of the IACHR's jurisdiction.<sup>88</sup> In other words, they serve the precautionary more than the preventive function of the urgent measure mechanism.

In addition to the examples of the death penalty described here, the IACHR has granted a small number of precautionary measures of an injunctive nature in cases related to the international custody of minors<sup>89</sup> and to the enforcement of extradition orders that violate the prohibition of *non-refoulement*.<sup>90</sup> These precedents are in line with the practice of other supranational human rights bodies and with the general principles of domestic procedural law.

According to the general principles of procedural law, the party seeking an injunction must satisfy two requirements: the *fumus boni iuris* ('smoke of good right') and the *periculum in mora* ('danger in delay'). The first requirement means that the request to preserve a legal situation is linked to the existence of a right protected by the applicable law. The second means that the

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damage to the traditional territories of the Indigenous peoples or communities concerned. Although this question is not the subject of this chapter, it would support the argument presented here that the reparations established in a final judgment in a contentious case may be meaningless if the organs of the Inter-American system do not order the suspension of certain state decisions that have a significant impact on traditional lands.

<sup>88</sup> Every single resolution on precautionary measures adopted by the IACHR in the last five years includes the following standard paragraph, which emphasizes the uniqueness of this type of 'injunctive precautionary measure' linked to a pending contentious case: 'Regarding their precautionary nature, these measures have the purpose of preserving a legal situation while under consideration by the organs of the Inter-American system. They aim to safeguard the rights at risk until the petition pending before the Inter-American system is resolved. Their object and purpose are to ensure the integrity and effectiveness of an eventual decision on the merits and, thus, avoid any further infringement of the rights at issue, a situation that may adversely affect the useful effect (*effet utile*) of the final decision. In this regard, precautionary or provisional measures enable the State concerned to comply with the final decision and, if necessary, to implement the ordered reparations.'

<sup>89</sup> See, e.g., IACHR Resolution No. 7/17 PM 68/17, Youth Panambí, Paraguay.

<sup>90</sup> See, e.g., *Wong Ho Wing v Peru*, Provisional Measures 10/09. This precedent gave rise to a provisional measure issued by the Inter-American Court. See: *Wong Ho Wing v Peru*, Provisional Measures (Order of 28 May 2010). It should be noted that in this precedent, the Court dismissed the case in question in its judgment on the merits, for which the provisional measures were lifted a few months after their adoption. Again, this is a normal practice of any judicial body authorized to issue precautionary/interim measures.

available evidence corroborates an imminent risk of infringement to that right. The adoption of precautionary measures to suspend state decisions that could cause irreparable harm to Indigenous territories requires a *prima facie* analysis of the existence of a *fumus boni iuris*, which is an adjudicative exercise utterly different from a prejudgment on the merits of a case.

In this sense, the complex and sometimes hostile diplomatic environment in which the IACHR exercises its mandate, and not the existence of legal constraints, seems to be the reason why the protection of Indigenous territorial rights was excluded from the precautionary measure mechanism back in 2011. While the political consequences of the IACHR's decisions go beyond the scope of this chapter, it is worth concluding with a legal path that could reinstate at least part of the approach abandoned in 2011.

Precautionary measures should be adopted when a *prima facie* assessment of the information indicates that the consent of Indigenous or tribal peoples whose territories are at risk of imminent irreparable harm has been violated. As described previously, there is a well-established rule in international human rights law that establishes the consent of such peoples when the authorization of certain economic activities has a profound impact on their cultural identity and physical subsistence. Articles 10 and 29(2) of the United Nations Declaration on the Rights of Indigenous Peoples uphold this rule, for example, with regards to the storage of hazardous materials on Indigenous lands or to decisions that could lead to their forced displacement. The IACHR has gone even further, explicitly adding industrial mining and hydrocarbons extraction to the list of activities that cannot be authorized without the consent of Indigenous and tribal peoples. The denial of precautionary measures in this type of situation would render the reparations in a related contentious case unachievable, especially if the decision on the merits is made several years after the filing of the complaint.

In light of the above, the IACHR should adopt a twofold practice consisting of: (1) granting precautionary measures to suspend large-scale projects with significant impacts on Indigenous territories until it issues a decision on the merits of the related case; and (2) prioritizing the processing of contentious cases that allege imminent irreparable harm to Indigenous territorial rights. With regard to the first suggestion, the IACHR should request information that establishes, with a *prima facie* standard of proof, that the concessions in question are those in which the Inter-American jurisprudence requires the mandatory consent of the Indigenous peoples or communities that suffer a potential impact.

As to the second suggestion, given the length of years and even decades that a petition can take at the IAHRs,<sup>91</sup> the decision to prioritize should be made on a broader basis and not only when the Commission decides to issue precautionary measures. This practice would correct a troubling omission in Resolution 4/23, which establishes the IACHR's policies for prioritizing petitions and cases that meet certain criteria. Adopted in December 2023, this resolution describes several examples of matters that merit expedited processing, such as international disputes over the custody of minors, deportation, or extradition when there is a risk of torture, lack of medical care for persons deprived of their liberty, etc.<sup>92</sup> Unfortunately, the resolution omitted the risk of significant harm to Indigenous and tribal territories from the list of circumstances justifying priority processing.

## 6 CONCLUSIONS

Although the IAHRs is the supranational system with the most advanced standards on Indigenous territorial rights, the current practice of its organs makes it virtually impossible to protect these rights through precautionary and provisional measures. Despite this limitation, some specific allegations related to the adverse impacts of large-scale projects in Indigenous and tribal lands are still addressed by the Court and, in particular, by the Commission. These include the protection of the life and physical integrity and, in some cases, the health of the communities as a whole or of their individual members, in the following circumstances:

- Threats, criminalization, and other acts of violence in retaliation for an Indigenous community's efforts to obtain legal recognition of its traditional territories and to defend its natural resources.
- Serious environmental degradation, such as oil spills and the presence of toxic substances in traditional lands, with a lack of access to adequate food, sanitation, and medical care.
- Forcible evictions and other forms of displacement. In a small number of these cases, states were requested to take the necessary measures to allow the affected community or individual members to return to their lands under safe conditions.

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<sup>91</sup> See: Fernando Basch and others, 'La efectividad del sistema interamericano de protección de derechos humanos: Un enfoque cuantitativo sobre su funcionamiento y sobre el cumplimiento de sus decisiones' (2010) 7 SUR 9. See also: Camilo Sánchez, 'Una década de peticiones y casos ante la CIDH' (2021) 23 *Aportes* 28.

<sup>92</sup> IACHR Resolution 4/23 – Doc. 329 Prioritization Policy for Petitions and Cases, 20 December 2023, para 2.

- Trespass and acts of violence, usually committed by illegal miners, loggers, and other non-state actors, in areas inhabited by Indigenous peoples in voluntary isolation.

While the precautionary and provisional measures remain accessible in these circumstances, the protection of Indigenous territorial rights has been excluded from these mechanisms since 2011, clearly due to political rather than legal constraints. This new approach has had a significant negative impact on Indigenous and tribal communities, which require a rapid response from the Inter-American bodies when their territories are at risk of irreparable harm.

It should be noted that the provisional measures of the Inter-American Court are usually requested by the IACHR when a state fails to comply with its precautionary measures. The last and only time that the IACHR requested this type of provisional measure was in the *Matter of the Four Ngöbe Indigenous Communities and their Members*, regarding Panama, in January 2010. Although the IACtHR rejected the request, it made no mention of the unsuitability of the provisional measures mechanism to prevent irreparable harm to Indigenous territorial rights. The Court could not reconsider this legal issue unless the IACHR modifies the approach inaugurated in 2011 and makes a new request for provisional measures.

This chapter concludes that the IACHR should reinstate the adoption of precautionary measures to suspend large-scale projects in exceptional circumstances that fall under the states' mandatory obligation to obtain the consent of Indigenous and tribal peoples. Finally, it should prioritize the processing of petitions and cases in which the alleged facts involve the risk of irreparable harm to their traditional territories, since they are indispensable to the exercise of rights such as physical subsistence and cultural integrity, the violation of which cannot be remedied.